ROSLI SUPARDI

v.

PP

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CRIMINAL APPEAL NO: B 09-22-2000]
4 MARCH 2002

CRIMINAL PROCEDURE: *Jurisdiction of court - High Court - Section 60(1) of the Courts of Judicature Act 1964 - Scope and application - Whether erroneously invoked by High Court judge - Whether proviso to s. 60(1) of the Courts of Judicature Act 1964 essentially similar to s. 422 of the Criminal Procedure Code - Whether erroneous invocation by High Court judge resulted in miscarriage of justice*

CRIMINAL PROCEDURE: *Prosecution - Close of prosecution - Standard of proof - Misdirection by sessions court judge - Whether application of correct test would have produced similar result - Whether misdirection resulted in failure of justice*

CRIMINAL PROCEDURE: *Sentence - Adequacy of sentencing - Conviction under s. 326 of the Penal Code - Whether sentence manifestly inadequate*

The appellant was convicted under s. 326 of the Penal Code, and sentenced to a term of six years imprisonment and three strokes of rotan. He appealed to the High Court, contending that the learned sessions judge had misdirected herself on the standard of proof that she applied at the close of the whole case as she had merely stated that the appellant had failed to raise a reasonable doubt on the prosecution's case without first making a prior finding that the prosecution had indeed established its case beyond reasonable doubt. The learned High Court judge concluded that no miscarriage of justice had occurred as a result of the misdirection by the sessions court on the standard of proof, and purported to apply the proviso to s. 60(1) of the Courts of Judicature Act 1964 ('CJA') which he thought was wider in scope and application than s. 422 of the Criminal Procedure Code ('CPC'). The appellant subsequently appealed against this decision.

Held:
Per Gopal Sri Ram JCA

[1] It was not open to the learned High Court judge to rely on the proviso to s. 60(1) of the CJA as that proviso is exclusive to this court and to the Federal Court. As far as High Courts are concerned, they must act within the confines of s. 422 of the CPC. However, following the Federal Court decision in *Tunde Apatira v. PP*, there is no essential difference between the proviso to s. 60(1) of the CJA and s. 422 of the CPC. Therefore, the erroneous invocation of the proviso to s. 60(1) of the CJA produced no substantial miscarriage of justice. (p 549 g-i)

[2] This court conducted a very careful scrutiny of the evidence on record with a view to ascertain whether a different result would have ensued had the correct test been applied as to the standard of proof both at the close of the prosecution's case and at the close of the whole case, and was entirely satisfied that there was sufficient evidence that established the guilt of the appellant even upon the application of the correct test. Hence, the misdirection on the standard of proof did not occasion any failure of justice. (p 550 a-c)

[3] As a general rule, it would be bad policy for this court to enhance the sentence in the absence of a cross-appeal by the public prosecutor. However, having regard to the facts and the circumstances of the appellant's case and giving public interest the weight it deserved, the court was satisfied that the sentence passed was manifestly inadequate, and therefore set aside and substituted the sentence of six years imprisonment and three strokes of rotan with a sentence of twelve years imprisonment and five strokes of rotan. (p 551 b, d-f)

[Appeal dismissed; sentence substituted accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu telah disabitkan di bawah s. 326 Kanun Keseksaan, dan dijatuhkan hukuman tempoh pemenjaraan selama enam tahun dan tiga kali sebatan rotan. Beliau telah merayu kepada Mahkamah Tinggi, dengan menegaskan bahawa hakim mahkamah sesyen yang bijaksana telah tersalah-arah akan dirinya sendiri atas standard bukti yang telah beliau pakai pada penutupan keseluruhan kes tersebut kerana beliau telah hanya menyatakan bahawa perayu telah gagal untuk membangkitkan keraguan yang wajar ke atas kes pendakwaan tanpa terlebih dahulu membuat keputusan bahawa pendakwaan telah sesungguhnya menetapkan kesnya di luar keraguan yang wajar. Hakim Mahkamah Tinggi yang bijaksana memutuskan bahawa tiada salah laksana keadilan telah berlaku

akibat salah-arahan oleh mahkamah sesyen ke atas standard bukti tersebut, dan bermaksud untuk memakai peruntukan kepada s. 60(1) Akta Mahkamah Kehakiman 1964 ('AMK') yang mana beliau fikirkan adalah lebih luas dalam bidang dan pemakaiannya dari s. 422 Kanun Prosedur Jenayah ('KPJ'). Perayu telah berikutan itu merayu terhadap keputusan ini.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Ianya adalah tidak terbuka kepada hakim Mahkamah Tinggi yang bijaksana untuk bergantung pada peruntukan kepada s. 60(1) AMK kerana peruntukan itu adalah eksklusif kepada mahkamah ini dan kepada Mahkamah Persekutuan. Sejauhmana ianya berkaitan dengan Mahkamah Tinggi, mereka haruslah bertindak di dalam lingkungan s. 422 KPJ tersebut. Walau bagaimanapun, berikutan keputusan Mahkamah Persekutuan di dalam *Tunde Apatira v. PP*, tidak terdapat perbezaan yang penting antara peruntukan kepada s. 60(1) AMK dan s. 422 KPJ tersebut. Oleh itu, penggunaan secara salah akan peruntukan kepada s. 60(1) AMK tidak menghasilkan salah laksana keadilan yang substansial.

[2] Mahkamah ini telah menjalankan penelitian yang berhemat akan keterangan yang dicatatkan dengan harapan untuk memastikan sama ada keputusan yang berlainan mungkin telah berlaku sekiranya ujian yang betul dipakai berhubung dengan standard bukti ketika penutupan keseluruhan kes, dan berpuashati sepenuhnya bahawa terdapat keterangan yang memadai yang telah menetapkan kesalahan perayu meskipun setelah pemakaian ujian yang betul. Oleh itu, salah-arahan ke atas standard bukti tidak menyebabkan sebarang kegagalan keadilan.

[3] Sebagai kaedah am, ianya adakan menjadi dasar yang tidak wajar bagi mahkamah ini untuk mempertingkatkan hukuman tersebut oleh kerana ketiadaan rayuan balas oleh pendakwa raya. Walau bagaimanapun, dalam menimbang fakta-fakta dan keadaan-keadaan kes perayu dan memandangkan kepentingan awam bagi penekanan yang seharusnya, mahkamah berpuashati bahawa hukuman yang telah dijatuhkan adalah amat tidak mencukupi, dan oleh itu telah mengenepikan dan menggantikan hukuman enam tahun pemenjaraan dan tiga kali sebatan rotan dengan pemenjaraan selama dua belas tahun dan lima kali sebatan rotan.

[Rayuan ditolak; hukuman digantikan sehubungan itu.]

Case(s) referred to:
Harun Abdullah v. PP [1998] 3 CLJ 184 ***(dist)***
Ishak Shaari v. PP [1997] 3 CLJ Supp 223 ***(not foll)***
PP v. Ku Yahya Ku Bahari & Anor [2002] 1 CLJ 113 ***(refd)***
Tunde Apatira v. PP [2001] 1 CLJ 381 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60(1)
Criminal Procedure Code, s. 422
Penal Code, s. 326

For the appellant - Manmohan Singh Kang; M/s Kang & Kang
For the respondent - Muniandy Kannyappan (Nuruhuda Nur'aini Mohd Nor DPP)

[Appeal from High Court, Shah Alam; Criminal Appeal No: 42-32-98]

Reported by Suresh Nathan

JUDGMENT
(oral)

Gopal Sri Ram JCA (delivering the judgment of the court):
This appeal arose from the decision of the High Court Shah Alam dismissing an appeal to it from the Sessions Court. The appellant before us was charged before the Sessions Court for an offence under s. 326 of the Penal Code. He defended himself during part of the case. During the later part of the trial, Mr. Manmohan Kang appeared for him and conducted an able defence on behalf of the appellant. At the close of the whole case, the appellant was convicted and sentenced to a term of six years imprisonment and three strokes of rotan. He was dissatisfied with the decision of the Sessions Court and as we mentioned a moment ago, he took his case further to the High Court.

One of the complaints advanced on his behalf in the High Court was that the learned Sessions Judge had misdirected herself on the standard of proof that she applied at the close of the whole case. The specific complaint made to the High Court, and before us this morning is that the Sessions Court judge asked herself the wrong question. It is said that she merely stated that the appellant had failed to raise a reasonable doubt on the prosecution's case without first making a prior finding that the prosecution had indeed established its case beyond reasonable doubt.

The learned High Court judge having applied his mind to the material before him, came to the conclusion that no miscarriage of justice had occurred because of the misdirection by the Sessions Court on the standard of proof. He then purported to apply the proviso to s. 60 of the Courts of Judicature Act 1964 which he thought was wider in scope and application than s. 422 of the Criminal Procedure Code.

In arguing the appeal before us, Mr. Manmohan Kang counsel for the appellant has made two important submissions. He first argued that the misdirection contained in the judgment of the Sessions Court is not curable under s. 422 of the Code. Second, he submits that the learned judge of the High Court fell into error by applying the proviso to s. 60 of the Courts of Judicature Act 1964. Before we address each of these arguments, it is useful to remind us the precise terms of s. 422. This is what it says:

> Irregularities not to vitiate proceedings
>
> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence,
>
> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

In *Ishak Shaari v. PP* [1997] 3 CLJ Supp. 223, Augustine Paul JC came to the conclusion that the section could not be applied to cure an illegality or nullity, such as the case in which there is a breach of an express provision of the Code or the breach of principle of general importance in the administration of justice. His conclusion on the law was upheld by this court in *Harun Abdullah v. PP* [1998] 3 CLJ 184 Abdul Malek Ahmad JCA in delivering judgment of this court said at p. 197 of the judgment:

> Of these three decisions, we must say that we are in full agreement with the decision in *Ishak Shaari v. PP* where the learned trial judge held that s. 422 of the CPC cannot be invoked to cure a breach where it involves the breach of an explicit provision of the CPC or where the breach involves a principle of general importance in the administration of justice. And as the error committed by the learned session court judge in misdirecting herself on the standard of proof on the prosecution fell within both the classifications in the instant appeal, it was incapable of rectification under s. 422 of the CPC.

Our attention has also been drawn by the learned deputy public prosecutor to the unreported judgment of this court in *PP v. Ku Yahya Ku Bahari & Anor* [2002] 1 CLJ 113 where on a complaint of misdirection on the standard of proof, a retrial was ordered by the High Court. The public prosecutor's appeal was dismissed by this court. This court affirmed and followed its decision in *Harun bin Abdullah.*

Both *Ishak Shaari* and *Harun Abdullah* were relied upon by learned counsel for the appellant before us. But we find *Harun Abdullah* readily distinguishable from the present case. In *Harun*, this court having come to the conclusion that s. 422 cannot be invoked to cure a misdirection by the trial court on the issue of standard of proof by the prosecution went on to undertake an exhausted review of evidence. It then found that:

> … applying the more stringent reasonable doubt test to the facts of this case on the evidence available, we could only conclude that the result would certainly not be the same as we hold that no case had been made out against the appellant beyond reasonable doubt. Consequently, the defence of the appellant should not have been called.

In other words, this court was satisfied that if s. 422 had been invoked, it could not on the facts of the case have cured the failure of justice that had been occasioned to the appellant in that case. To put it shortly, the section did not apply because a proper direction on the standard of proof would have resulted in an acquittal of the appellant.

So far as *Ishak Shaari* is concerned, it no longer in our view represents the law. For in *Tunde Apatira v. PP* [2001] 1 CLJ 381 a full Federal Court found that in an exceptional case where the evidence is clear and cogent, an appellate court may affirm a conviction despite a misdirection. In the course of its judgment, the Federal Court observed that there was no material difference between the phrase 'miscarriage of justice' in the proviso to s. 60 of the Courts of Judicature Act 1964 and the phrase 'failure of justice' appearing in s. 422 of the Code. There is therefore, serious doubt in our minds as to the correctness of the proposition made in *Ishak Shaari*'s case that a misdirection as to the standard of proof must automatically and without more result in a setting aside of a conviction despite s. 422 of the Criminal Procedure Code.

We now turn to address the second argument. There is nothing much to be said about it. The decision in *Tunde Apatira* is a complete answer to the complaint now advanced before us. We, of course entirely agree with the submission of the learned counsel for the appellant that it was not open to the learned High Court judge to rely on the proviso to s. 60 of the Courts of Judicature Act 1964. That proviso is exclusive to this court and to the Federal Court. As far as High Courts are concerned, they must act within the confines of s. 422. But the error of the learned judge in applying the wrong provision, matters not a jot here. Since *Tunde Apatira*, there is no essential difference between the proviso to s. 60 and s. 422. They mean the same thing. The erroneous invocation of the proviso to s. 60, though an error, has produced no substantial miscarriage of justice. For these reasons, we find no merit in this submission.

However for completeness, having found that s. 422 is applicable, as argued by the learned deputy public prosecutor, we have conducted a very careful scrutiny of the evidence on record with a view to ascertain whether a different result would have ensued had the correct test been applied as to the standard of proof both at the close of the prosecution's case and at the close of the whole case. Having done so, we are entirely satisfied that there is sufficient evidence of a highly convincing character that establish the guilt of the appellant even upon the application of the correct test. In other words, the defence was rightly called and the appellant was properly convicted. So, the misdirection on the standard of proof has not occasioned any failure of justice. In these circumstances, there is no merit in the complaint against conviction and the appeal against conviction is therefore dismissed.

We now turn to sentence. This is a very serious case. The circumstances in which the complainant PW5's throat was cut several times is particularly barbaric. Sentence passed by the trial court and affirmed by the intermediate appeal court is in our carefully considered view, manifestly inadequate. This court has power under s. 60 of the Courts of Judicature Act 1964 to enhance the sentence imposed either by the Sessions Court or High Court. The question is whether we should exercise the power on the facts of the present case. Mr. Manmohan Kang has in a very able and a carefully developed argument advanced three grounds based on which he says we should not interfere here. First, because the appellant had defended himself for a large part of the trial and therefore may not have appreciated the seriousness of the case. Second, because it is a bad policy for this court to exercise its power particularly in the face of an absence of a cross-appeal by the public prosecutor. Thirdly, because this appeal was pursued before us to canvass a point of obvious importance to the Criminal Bar. Of these reasons, we find that we need to address only on the second. We would do that in a moment. So far as the first is concerned, it is without any basis. An acceptance of counsel's argument, would mean that in any case where the accused chose to defend himself, some more special consideration ought to be accorded than to a case where he is not represented. That cannot be it. An accused defends himself or engages counsel as a matter of choice. And if he should exercise his choice one way or the other, who are we to criticize that? Particularly it is so when there is an extremely active legal aid service afforded by the Bar Council and State Bar Committee at the grass-root level so that legal representation is made that much easier these days. As far as the third ground is concerned, the appellant who comes before us runs the risk of any order we may make. The fact that he has the academic interest of the legal profession is neither here nor there.

That brings us to the second and most important ground. It is a matter of policy. And it is an important point. As Encik K. Muniandy the learned deputy public prosecutor with his usual eminent fairness points out, that this is the final court so far as this appeal is concerned. He thereafter suggested that we should not interfere with the sentence purely because the appellant has no further avenue. We are fully conscious of the policy consideration of such cases of this nature. We agree with both Mr. Manmohan Kang and the learned deputy public prosecutor that as a general rule it would be bad policy for this court to enhance the sentence in the absence of a cross-appeal by the public prosecutor. But every case depends on its own facts. And the gory details of the present case from the evidence rehearsed before us by the learned deputy public prosecutor makes this an exceptional case. As we said when we commence this judgment, this is a serious case. The sentence imposed does not even attempt to meet the public interest nor does it have any relation to the aggravated circumstances in which the offence was committed. We would be plainly failing in our duty, to our conscience and to the public if we did not interfere in this case. Having regard to the facts and the circumstances of the appellant's case and giving public interest the weight it deserves, we are satisfied that the sentence passed is manifestly inadequate, we would therefore, take these considerations into account and the other circumstances advanced in plea of mitigation before the Sessions Court, we would set aside the sentence of six years and substitute in place with 12 years imprisonment from 30 September 1994 (date of arrest). We would also set aside the sentence of three strokes of rotan and substitute in place with five strokes. The orders of the Sessions Court are altered to this effect.